Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1167

JAMES VERNON MAGEEAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Judgment Affirming Judgment of the United States District Court for the Central District of California.

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The Petitioner, James Vernon Mageean, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 4, 1977. The Order denying Petitioner's Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit was filed on January 20, 1978.

Opinion Below.

The opinion of the Court of Appeals has not yet been reported. A copy of the Court's Memorandum Opinion filed on November 4, 1977, is attached hereto as Appendix "A". A copy of the Order denying the Petition for Rehearing in the United States Court of

Appeals for the Ninth Circuit is attached hereto as Appendix "B". There is no reported or written opinion of the District Court in this case.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 4, 1977. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on January 20, 1978, and this Petition for Certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented.

Whether Petitioner James Vernon Mageean was denied due process and, therefore, a fair trial due to the fact that, although the indictment apparently charged him with stealing and receiving separate items of property, in fact, the trial proceeded and the case was submitted to the jury, without a proper instruction, on the theory that Mageean both stole and received the same property.

Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

United States Code, Title 18, Section 641 provides:

> "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes

> of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> "Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> "The word 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

Statement of the Case.

Petitioner Mageean was charged in a two-count Indictment pursuant to Title 18, United States Code, §641. In Count One, Mageean was alleged to have stolen thirteen (13) items of Government property each of which was a component part of something known as a Thermo/Gravimetric Analyzer set. In Count Two, Mageean was charged, in essence, with receiving eight (8) items of stolen Government property. All of the items set forth in Counts One and Two were discovered at the same time in Mageean's garage, or along side the garage, by agents of the FBI. The jury *acquitted* Mageean on the charge of theft in Count One. Following additional significant

events in the course of its deliberations, which will be discussed hereinbelow, the jury found Mageean guilty of receiving stolen government property as alleged in Count Two. Beyond question, the entire case was tried by the Government on the theory that Mageean stole all of the equipment charged in the Indictment and was guilty, as well, of receiving the same property.

Mageean urges in this Petition that he was, in reality, charged with stealing and receiving essentially the same property and that the manner in which the trial was conducted made the giving of a proper jury instruction mandatory. Even though the Indictment attempts to segregate the items in Counts One and Two, the record below reveals that all of the items were a part of the same project, the Government witnesses were either unable or unwilling properly to distinguish the items for the jury and that, in essence, Mageean was convicted, without the required instruction, by a badly confused jury, of receiving the same property which that jury found *he did not steal*. It is submitted that, while the Government may have been technically correct in indicting as it did, after all of the evidence was in it was apparent that Mageean had been tried as both the thief and the recipient of the same property.

At all times relevant to this case, Mageean was employed as an aerospace engineer at TRW. The record shows that Mageean was charged with the theft and receipt of property intended for one $2,000,000 TRW project referred to as the Chemical Pump Development Program. Within that program a device called the Thermo/Gravimetric Analyzer was to be developed. All of the items charged in the Indictment were apparently components of this device. Interestingly enough, the only comprehensible attempt to summarize the TRW

program at trial came from Mageean's own testimony. The Government did not come close to enlightening the jury as to how it might understand the purposes for which the TRW property was intended or how it might distinguish between the items charged in the Indictment.

In its brief in the United States Court of Appeals herein ("App. Br."), the Government took a belated stab at segregating the relevant items:

> "The equipment comprising the Theta Shipment which is charged in Count One of the Indictment is completely separate and distinct from the property which is charged in Count Two of the Indictment [R.T.[1] pp. 152-153, 177, 220, 340, 346]." App. Br. p. 5.

For this Court's convenience, these pages of the reporter's transcript, cited by the Government at page 5 of its brief in the Ninth Circuit Court of Appeals, have been attached hereto in their entirety as Appendix "C". It is clear from a review of these pages, and others in the transcript, that the separate and distinct nature of the property was never established at trial.

Some of the highlights from the Government's own references to the trial record are as follows:

> "Q These items that you have just testified about are not part of that Theta shipment, is that correct?
>
> "A Based upon the dates, I would say that they—there are no shipments in this package bearing Theta packing slips.

---

[1]Refers to Reporter's Transcript of proceedings in Federal District Court.

"Q Would it be your testimony then that they are not of the Theta shipment?

"A I really wouldn't know because I did not break the seals on the seven boxes, nor have them broken. The seven boxes specifically, from Theta, I believe—now correct me if I'm wrong —are included in the indictment one." [R.T. 152.]

* * *

"Q BY MR. DIAZ: Now, you are familiar then with the purpose and uses of what was referred to as the Delta Mask System?

"A No, I'm not. I know that we manufactured items of equipment which we referred to as Delta Mask. I do not understand the application or the use for which they were intended.

"Q Well then, it's not your testimony then that the manufacture of chemical pumps would require the use of a Delta Mask System equipment?

"A I have no idea what the Delta Mask System equipment was to be used for. There was another item of equipment which we provided." [R.T. 177.]

As revealed in the pages set forth in Appendix "C" hereto, the balance of the Government's citations scarcely deal with the issue of the distinct nature of the Count One and Count Two property except at R.T. 220, when Gerard Elverum, a TRW employee, affirmed, for whatever it was worth, that "the diffusion pump is not part of the Theta shipment."

REASONS FOR GRANTING THE WRIT.

The applicable principles of law are well settled. A defendant cannot be convicted of *both* the theft of certain property and the receipt of the same stolen property. *Milanovich v. United States,* 365 U.S. 551, 553-554, 81 S.Ct. 728 (1961); *United States v. O'Neill,* 436 F.2d 571 (9th Cir., 1970); *Keating v. United States,* 413 F.2d 1028 (9th Cir., 1969). Secondly, allegations of theft and receipt of the same stolen property may be contained in the same indictment. The Government has the discretion to choose between the two allegations or prosecute under both theories. *United States v. O'Brien,* 391 U.S. 367, 380, 88 S.Ct. 1673 (1968). Finally, since a defendant cannot be convicted of *both* theft and receipt of the stolen property in question, if he is so charged in the indictment, he is entitled to a jury instruction that he can be convicted of either offense but not both. *Milanovich, supra,* at 555.

The trial court failed to follow the applicable principles of law set forth in *Milanovich, supra, O'Neill, supra,* and *Keating, supra.* The case below was not presented by the Government in a manner consistent with the face of the indictment. What in fact happened was that the case was submitted to the jury in a manner requiring an instruction as mandated by *Milanovich, supra,* that Petitioner Mageean could be convicted of either the offense of theft or receiving stolen property but *not* both offenses. Such an instruction was not given.

It is ludicrous even to suggest that the record below reveals that the jury conceptualized the two counts of the Indictment as involving separate and distinct property.

The Government at no time attempted to cure this confusion in any meaningful way. Most of the Government's witnesses confessed to a lack of knowledge or specific familiarity with respect to the equipment in question or a general lack of technical expertise. The Government prosecutor candidly admitted during closing argument that even he did not "really know what these other items (those included in the Indictment) do . . ." Furthermore, certain of the charged items were erroneously named in the Indictment, thus creating additional confusion at trial.

There was constant and substantial confusion as to how the Count One items and Count Two items might be generally described and their progress charted through the factual maze of this case. No uniform system was ever used. For example, the supervisor of the shipping and receiving department at TRW was not sure whether the Count Two items were the items *manufactured by Torr Vacuum* or whether they were the items *delivered to Torr* by TRW. This is particularly crucial testimony since the Government was apparently proceeding on the theory that the Count One equipment was manufactured by Theta and *delivered to Torr.*

Mageean, in an attempt to explain the Chemical Pump Development Program used the terms "Theta shipment" and "Delta Mass" interchangeably. To further complicate matters, Gerard Elverum, the manager of Mageean's division at TRW, testified as follows:

"Q The Delta Mask System is in fact Theta equipment and Torr equipment, is that correct?
"A Yes." [R.T. 217.]

Adding to the confusion, the Government insisted on dwelling at length upon the alleged theft of two items of equipment, referred to as "precision power sources," which were not a part of the Indictment at all. In his closing argument, the Government prosecutor then proceeded to lump these precision power sources, along with an allegedly stolen TRW telephone and typewriter, in the context of his discussion of Count Two. (This portion of the prosecutor's argument is attached hereto as Appendix "D" for the Court's convenience.)

The actions of the jury after the case was submitted to it strongly support the argument that the jury believed that it was within its power to find that Mageean both stole and received the same Government property. It took the jury less than four hours to find that Mageean was not a thief. At the end of that four hour period, seven of the jurors indicated to the Court that they felt they could not reach a verdict on the receiving count, Count Two.

The jury resumed deliberations, however, and later sent a note to the Court requesting "a legal definition of intent to convert property to his own use." The Court thereafter gave the jury some additional instructions, none of which dealt with the crucial issue as to whether or not Petitioner Mageean could be convicted of both the theft and receipt of the same property. Within one hour after receiving these further instructions, the jury returned a verdict of guilty with regard to Count Two. Clearly, the befuddled jury decided

that the least they could do was convict Petitioner Mageean of something in the nature of an unauthorized or undisclosed use of the property of another.

A thorough reading of the entire proceedings in the Court below leads inescapably to the conclusion that this case was tried on the theory that Petitioner Mageean stole and received the same property. This case is analogous to a bank robbery prosecution in which a robber who is alleged to have stolen $1,000 is indicted for stealing $500 and receiving the other $500.

While the implications of the Government's evidence may not have been apparent until the close of the Government's case in chief, or perhaps not until the close of the trial, based upon the evidence presented Mageean was entitled to have one count removed from the jury's consideration or he was entitled to an instruction that he could be convicted of either count but *not* both. *Milanovich, supra.* In fact, however, the Court instructed that:

> "The fact that you may find the accused guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged."

It is submitted that Mageean was denied a fair trial because of the manner in which the case was finally submitted to the jury. The errors discussed herein require the issuance of a Writ of Certiorari.

The verdict below, based as it was upon a mass of confusing evidence and the absence of a required instruction, resulted from the jury obviously concluding that Mageean did "something wrong" but not that with which he was charged. Surely such a verdict

must be set aside. Due process requires that Mageean be retried either for the theft *and* receipt of the subject property (set forth in Count Two), with proper instructions to the jury, or that the Government proceed on one theory or the other.

Conclusion.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

By STEPHEN D. MILLER,
J. KENT STEELE,
Attorneys for Petitioner.

Of Counsel:
MILLER, GLASSMAN & BROWNING, INCORPORATED

APPENDIX "A".

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. James Vernon Mageean, Defendant-Appellant. No. 77-1001.

Filed: Nov. 4, 1977.

Appeal from the United States District Court for the Central District of California.

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and ORRICK,* District Judge.

Upon this appeal from his conviction for receiving stolen government property, appellant contends (1) a person who has stolen government property cannot be convicted for receiving the property that he has stolen; and (2) the evidence was insufficient to prove that the property in question was stolen.

The first contention has been squarely decided against the appellant in *United States v. Bracken* (9th 1977) 558 F.2d 544, a case that came down while this appeal was pending.

The evidence was sufficient to sustain his conviction on the charge of receiving and retaining the government property as charged in count 2. The pivot of appellant's claim is that his property movement authorization permitted him both to move the property in issue and to store it temporarily on behalf of the Government and his employer. The jury, of course, was not obliged to believe appellant's version of the facts. There was evidence which permitted the jury appropriately to infer

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*Honorable William H. Orrick, Jr., United States District Judge, Northern District of California, sitting by designation.

that appellant had not merely stored this equipment, intending to deliver it to the TRW plant in appropriate course. Appellant's garage was so full of equipment, that he had had to store much of the Theta shipment, the last arrival, along the side of his house. The jury could properly have believed that his conduct was consistent with keeping the property for himself and inconsistent with any intention of providing a temporary storage facility for the Government or for his employer. Moreover, testimony from other TRW employees indicated that none of them ever interpreted property movement passes to authorize them to do more than to move equipment from one building to another, or from one facility to another, possibly with an overnight stop at home. From such testimony, the jury could also infer that appellant did not entertain a good faith belief that his handling of the equipment was within the scope of his authorization.

At most, this case involves conflicting inferences that could be drawn from conflicting testimony. Resolution of questions of credibility, including resolution of any conflicts in the testimony, reside solely with the triers of fact. Their determinations, if properly based upon the evidence, cannot be successfully attacked on appeal.

AFFIRMED.

APPENDIX "B".

Order.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. James Vernon Mageean, Defendant-Appellant. No. 77-1001.

Filed: Jan. 20, 1978.

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and ORRICK,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hufstedler and Goodwin have voted to reject the suggestion for en banc rehearing.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable William H. Orrick, Jr., United States District Judge, Northern District of California, sitting by designation.

APPENDIX "C".

CROSS-EXAMINATION

(R.T. 152)

BY MR. DIAZ:

Q Mr. Calkins, Mr. Gray, I believe, asked you if you were familiar with the Theta shipment, is that correct?

A Yes, sir.

Q These items that you have just testified about are not part of that Theta shipment, is that correct?

A Based upon the dates, I would say that they—there are no shipments in this package bearing Theta packing slips.

Q Would it be your testimony then that they are not of the Theta shipment?

A I really wouldn't know because I did not break the seals on the seven boxes, nor have them broken. The seven boxes specifically, from Theta, I believe—now correct me if I'm wrong—are included in the indictment one.

Q You mean Count 1?

A Count 1, yes, sir.

Q Now, do you know when the Theta shipment arrived at TRW?

A Yes, I know when it arrived. I have a statement of facts that has all that written down. It happened back in April, I believe, and my memory—I'd rather not trust it when I know, when I have the written proof of it.

Q Isn't it a fact that the Theta shipment arrived during the months of March and April?

(R.T. 153)

A It is quite possible.

Q And the items that you have just testified about were all delivered prior to January 27, 1976, isn't that correct?

A If that was the latest date to which I spoke, yes.

Q Then, would it necessariiy conclude then they were not part of the Theta shipment?

A I cannot answer that specifically, because I don't know.

Q A moment ago—

Would you please refer to Government's Exhibit 17.

Mr. Gray asked you whether or not that document reflected a shipment of Four Dynamics Circuit Boards, isn't that correct?

A The circuit boards as interpreted by a person that I believe will appear later here was interpreted to me to be the Amplifier Mainframes.

Q Who is that person?

A Mr. Elverum.

Q Is it your testimony then that you don't know yourself whether Four Dynamics Circuit Boards would mean the same as indicated in that document?

A I am not a technician, no, sir.

Q Does Item 14 of the government's exhibits, does it also include a statement referred to as One Diffusion Pumping . . .

* * *

(R.T. 177)

. . . your Honor, first of all, that the practicality of making—

THE COURT: I will sustain the objection to the question you asked him.

Q BY MR. DIAZ: Now, you are familiar then with the purpose and uses of what was referred to as the Delta Mask System?

A No, I'm not. I know that we manufactured items of equipment which we referred to as Delta Mask. I do not understand the application or the use for which they were intended.

Q Well then, it's not your testimony then that the manufacture of chemical pumps would require the use of a Delta Mask System equipment?

A I have no idea what the Delta Mask System equipment was to be used for. There was another item of equipment which we provided.

Q Again then, when you referred to the manufacture of the chemical enzymes that would be used as a urine eraser, you don't know again whether or not this equipment would be used for the manufacture of the development of these enzymes, is that correct?

A I do not.

Q When you had that second discussion regarding the enzymes with Mr. Mageean, that actually occurred the day before he picked up the equipment from your location?

* * *

(R.T. 220)

And Mr. Mageean came over, you know and simply indicated, he said, "That piece of equipment has nothing to do with this." So I didn't ask him, he just simply told me that "That piece of equipment had nothing to do with this."

Q Was he referring to the list?

A I can't tell you whether he was referring to a list. He just said "Has nothing to do with this."

I assumed he was talking about all the equipment that was seen in the driveway there.

Q Now, the diffusion pump is not part of the Theta shipment, is it?

A No, that's right.

Q Now, you referred to a card; are you referring to a property movement privilege card?

A Yes, sir.

Q To your knowledge was one issued to Mr. Mageean?

A I believe such a card was issued to Mr. Mageean.

Q Did you ever at any time discuss with Mr. Mageean what the limitations were with respect to that card?

A I did not personally, no.

Q To your knowledge, is there any orientation as to what the limitations are as to those cards?

A I believe there is a company standard practice relating to those cards. I can't—I do not believe there is a formal, verbal orientation.

* * *

(R.T. 340)

. . . have any way of bringing them back."

And he insisted that some way we, I had to leave and come home because he absolutely had to have me at home. So I agreed to do that.

And I rushed around and found a ride home for my other two families that I had taken down to the Elks Club. And I left the Elks Club then and drove home.

I arrived home at about, oh, I don't know, 10 past 10:00, something like that. There were a bunch of men in the kitchen of the house.

Q Did you have a conversation with any of those men?

A Yes.

I walked into the house, and immediately came up and said, "Are you Mr. Mageean?"

I said, "Yes." And I believe Mr. Gallagher opened up a black folder or something like that and said "I have a search warrant."

Oh, no, they identified themselves as FBI agents, had cards, identification, opened up a folder, and he says, "I have got a search warrant here for certain equipment." He says, "I want you to sit down and look it over."

We were at the kitchen there. So I sat down and read through the search warrant, and the search warrant spelled out a bunch of equipment in there which was equipment that, you can take that list off of the shipping list of the Theta . . .

* * *

(R.T. 346)

. . . putting things out in the driveway, and I said, "Well, what are going to do now?"

And they said, well, we are going to take all this back to TRW, which was certainly their right if they wanted to. And I said, "Well, you are removing a lot of equipment which isn't in the search warrant."

And I believe Mr. Gallagher told me that they had a right to remove anything there which someone identified as being theirs, or if they had suspicions of it.

I says, "Well, how far do you go with that?"

They had the kids' bicycles out in the driveway, and whatever. He said, well, anything that—he says, "We can take anything here and if we determine at

a later date that they are yours then they will be returned to you."

I guess that is what you do.

I didn't agree with it, but at that point you don't argue with the people that are conducting the activity.

I went back in the house. And at a later time Mr. Elverum arrived. I wasn't out there when he arrived, but I looked out the window and he was out there. So I went outside and Jerry was trying to identify things on the search warrant with actual objects. So I offered to help him.

I had offered to the FBI agents on the first time that I went out to do the same thing, and I had offered in the kitchen to do that. But they had declined because I would be . . .

APPENDIX "D".

(R.T. 441)

his garage, typewriters and all, with the intent that it was now his property. And I think that that is shown beyond any reasonable doubt by the evidence. In fact, beyond that I think it's shown beyond any doubt. I'm almost prepared to stand on that prospect completely.

Now let me go back to Count 2, because I told you the elements that were in Count 1. Count 2 has five elements, very similar to Count 1. Count 2 has five elements, very similar to Count 1. However, with one addition. I will go over these elements for you, and you will note many are similar indeed.

Count 2, and we are talking about the receiving, the retaining of the other listed items on the Indictment.

We believe if the defendant received, concealed or retained property listed in Count 2, that would be element number one, that that property was in fact the property of the United States Government. That would be Count 2. Again, we believe, and I've already addressed that point. We believe that it's shown without contradiction that it is.

Number three, that the defendant knew that this property was embezzled or stolen, purloined or wrongfully converted. He doesn't have to know, by the way, that it's government property, that it was stolen; he only has to know that the property was stolen. It could have belonged to anybody as far as his knowledge would be concerned. You do not have to find that he knew it was stolen government property.

(R.T. 442)

Number four, that he did these acts willfully and knowingly, and number five, again the value. You must find that he took any, at least one of these seven items, and that that one element, or that one item had a value of more than $100. If you find such, if you find even one that it was worth more than $100, that entire element and in fact that entire series of elements would be satisfied.

We believe again, going back, that receiving or concealing or retention of these items was not controverted, and he said so himself on the stand.

The property of the United States, I have already addressed. And I believe that that was not controverted either. Once it is received by TRW, and it was received, said Mr. Calkins, that property had title, and had passed to the United States.

And we get to willfully and knowingly doing these acts. Well, again we say that this would be very similar as to what we talked about before. We can show that one of these items was taken, or two, the precision power sources as far as the prior similar act was concerned. We can't show any of these other government items at the point that they were taken, but I think it's reasonable to infer that by virtue of the position of trust, position of trust, that this project manager had nobody question him as he carted all of these things out the gate. He converted, I would argue to you people, that he converted this position

(R.T. 443)

of trust basically into a license to steal.

Neither the Property movement pass, which is a very convenient type of avenue or vehicle whereby to carry this off, this didn't provide the authorization, it just provides the excuse and the means. He certainly has been provided with this method for abuse. We would argue that he carried it out quite readily.

Now that he is caught, of course, that makes a pretty good reason for excuse for that sort of behavior. However, it does say, you will notice, the defendant's exhibit, that it says in typed capital letters right on the front that "This is not for anything except parts and laser hardware." And I submit, as Mr. Elverum testified, that much of this equipment in his garage was under no stretch of the imagination parts or laser hardware. Some of it was, but much of it was not. And certainly nobody would say that the typewriter, that the telephone were.

I mention the typewriter and telephone quite frequently, it's something I confess to you that I am more familiar with, that I don't really know what these other items do, particularly, but under no stretch of the imagination do we believe that he would possibly have any reason to take a telephone, a squak box out of his own building and take it home, or a typewriter either.